Castle Inn Sdn Bhd v Bumiputra-Commerce Bank Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–224 OF 2004(4)
AZAHAR MOHAMED J
17 APRIL 2007

Civil Procedure — Ex parte application — Non-disclosure of material facts — Whether fit and proper to set aside ex parte order due to failure to fully and frankly disclose material facts

Civil Procedure — Writ of summons — Renewal — Whether plaintiff had adduced good reasons for court to exercise its discretion in renewing writ of summons

The defendant appealed against the decision of the learned deputy registrar in dismissing the defendant's application to set side the ex parte order dated 10 September 2004, obtained by the plaintiff to extend the validity of the writ of summons for service. The facts which led to this appeal emanated from the writ of summons and statement of claim which was filed on 25 March 2004 against the defendants. On 10 September 2004, before the expiry of the writ of summons for service, the plaintiff filed the ex parte summons in chambers (encl 5) to extend its validity which was allowed by the learned deputy registrar. The grounds relied upon by the plaintiff in obtaining the ex parte order were inter alia; (a) that the plaintiff had been taken over by a new management and the new management had not decided if they wished to continue with the action; and (b) the new management of the plaintiff needed more time to study the facts of this case before any final decision was made. The writ of summons and the statement of claim was only served on the defendant on 9 March 2005; almost a year after the writ of summons was issued. Thereafter, the defendant took out a summons in chambers (encl 24) dated 29 March 2005 to set aside; (a) the order renewing the writ of summons; and (b) service of the writ. The defendant's application was subsequently dismissed by the learned deputy registrar. At the hearing of this appeal, learned counsel for the defendant argued, inter alia, that the plaintiff had failed to make a full and frank disclosure of all material facts at the time of filing the ex parte application.

Held, allowing the defendant's appeal with costs:

(1) The plaintiff not only failed to fulfill full and frank disclosure of material facts concerning the management of the plaintiff's company at the material time in obtaining the ex parte order but it also made misleading material representations. It was fit and proper to set aside the ex parte order (see para 8), *Baly v Barrett* [1988] NI 368 and *Creative Furnishing Sdn Bhd v Wong Koi @ Wong Khoon Foh t/a Syarikat Sri Jaya* [1989] 2 CLJ 93 followed.

(2) The jurisdiction of the court to renew a writ of summons was not to be exercised in all cases and indiscriminately. Renewal of a writ of summons should only be granted where the court is satisfied that good reasons appear to excuse the delay in service. In the present case, the plaintiff had not advanced any good reason for the exercise of the court's discretion to renew the writ of summons (see para 14), *Baker v Bowketts Cakes Ltd* [1966] 1 WLR 861 and *New Ching Kee v Lim Ser Hock* [1975] 2 MLJ 183 referred; *Lloyd Triestino Societa v Chocolate Products (Malaysia) Sdn Bhd* [1978] 2 MLJ 27 followed;

(3) In the circumstances of this case, the learned deputy registrar had erroneously given no weight to relevant considerations in dismissing the defendant's application in encl 24 (see para 15).

[Bahasa Malaysia summary

Defendan merayu terhadap keputusan timbalan pendaftar yang bijaksana kerana telah menolak permohonan defendan bagi mengenepikan perintah ex parte bertarikh 10 September 2004, yang diperolehi oleh plaintif untuk melanjutkan tempoh kesahan writ saman untuk penyampaian. Fakta-fakta yang menyebabkan pemfailan rayuan ini datangnya daripada writ saman dan pernyataan tuntutan yang difailkan pada 25 March 2004 terhadap defendan. Pada 10 September 2004, sebelum tarikh luput writ saman untuk penyampaian, plaintif telah memfailkan ex parte saman dalam kamar (kand 5) bagi melanjutkan kesahannya yang mana telah dibenarkan oleh timbalan pendaftar yang bijaksana. Alasan-alasan yang digunakan oleh plaintif untuk mendapatkan perintah ex parte adalah, antara lain; (a) plaintif telah diambil alih oleh pengurusan baru dan pengurusan baru belum memutuskan sama ada untuk meneruskan dengan tindakan ini; dan (b) pengurusan baru plaintif memerlukan lebih masa untuk meneliti fakta-fakta kes sebelum sebarang keputusan muktamad di buat. Writ saman dan pernyataan tuntutan hanya dapat diserahkan kepada defendan pada 9 Mac 2005; hampir setahun selepas saman dikeluarkan. Selepas itu, defendan telah memasukkan saman dalam kamar (kand 24) bertarikh 29 Mac 2005 untuk mengenepikannya; (a) perintah memperbaharui writ saman; (b) penyampaian writ. Permohonan defendan kemudiannya ditolak oleh timbalan pendaftar yang bijaksana. Semasa pendengaran rayuan ini, peguam defendan yang bijaksana berhujah, antara lain, bahawa plaintif gagal untuk membuat pendedahan penuh dan terus terang terhadap keseluruhan fakta-fakta material semasa memfailkan permohonan ex parte.

Diputuskan, membenarkan rayuan defendan dengan kos:

(1) Plaintif bukan sahaja gagal untuk memenuhi pendedahan penuh dan terus terang tehadap fakta-fakta material berkenaan dengan pengurusan syarikat plaintif pada setiap masa yang material dalam mendapatkan perintah ex parte tetapi mereka juga telah mengelirukan representasi-representasi material. Ia adalah sesuai dan betul untuk mengenepikan perintah ex parte. (lihat perenggan 8), *Baly v Barrett* [1988] NI 368 and *Creative Furnishing Sdn Bhd v Wong Koi @ Wong Khoon Foh t/a Syarikat Sri Jaya* [1989] 2 CLJ 93 diikuti).

(2) Bidangkuasa mahkamah untuk memperbaharui writ saman tidak boleh dibuat dalam setiap kes secara sembarangan. Memperbaharui writ saman hanya boleh diberikan bila mahkamah berpuas hati bahawa terdapat sebab kukuh untuk mengecualikan kelewatan penyampaian. Dalam kes ini, plaintif tidak mengutarakan sebab yang baik bagi membolehkan mahkamah menggunakan budi bicaranya bagi memperbaharui writ saman (lihat perenggan 14), *Baker v Bowketts Cakes Ltd* [1966] 1 WLR 861 and *New Ching Kee v Lim Ser Hock* [1975] 2 MLJ 183 referred; *Lloyd Triestino Societa v Chocolate Products (Malaysia) Sdn Bhd* [1978] 2 MLJ 27 diikuti;

(3) Bersandarkan keadaan-keadaan dalam kes ini, timbalan pendaftar yang bijaksana telah khilaf dengan tidak menititikberatkan pertimbangan yang sewajarnya semasa menolak permohonan defendan dalam kandungan 24 (lihat perenggan 15).]

Notes

For cases on non disclosure of material facts, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2356.

For cases on renewal of writ of summons, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3701–3717.

Cases referred to

Baker v Bowketts Cakes Ltd [1966] 1 WLR 861 (refd)

Baly v Barrett [1988] NI 368 (folld)

Binning Bros Ltd v Verrall Bowles (refd) [1998] 1 All ER 409 (refd)

Creative Furnishing Sdn Bhd v Wong Koi @ Wong Khoon Foh t/a Syarikat Sri Jaya [1989] 2 MLJ 153 (folld)

Lloyd Triestino Societa v Chocolate Products (Malaysia) Sdn Bhd [1978] 2 MLJ 27 (folld)

New Ching Kee v Lim Ser Hock [1975] 2 MLJ 183 (refd)

Legislation referred to

Civil Law Act 1956 s 11

Rules of the High Court 1980 O 6 r 7

Lau Mark Chi Ming (Sivanathan) for the plaintiff.

DP Naban (Sean Yeow with him) (KF Hua & Partners) for the defendant.

Azahar Mohd J:

[1] This was an appeal by the defendant in encl 42 against the decision of the learned deputy registrar dismissing the defendant's application in encl 24 to set aside the ex parte order dated 10 September 2004. In order to understand this appeal, here is the factual background in outline as well as the sequence of events leading to it.

[2] The plaintiff was a property development company. The defendant was a licensed financial institution. On 25 March 2004, the plaintiff filed a writ of summons and statement of claim herein against the defendants. It appears that the

plaintiff's cause of action was based on the defendant's alleged breach of contract arising from the non-disbursement of banking facilities and/or the purported sale of the facilities to Danaharta Urus Sdn Bhd. In this action the plaintiff prayed, inter alia, for the following orders:

(a) Damages for breach of contract for the amount of RM110,990,476.20;

(b) General damages against the defendant for negligence;

(c) Exemplary damages;

(d) Pre-judgment interest pursuant to s 11 of the Civil Law Act 1956 as this honourable court deems fit and just.

[3] The law says that the writ of summons may not be served more than six calendar months after 25 March 2004 unless renewed by order of court. That was why on 10 September 2004, before the expiry of the writ of summons for service, the plaintiff filed an ex parte summons in chamber (encl 5) to extend its validity. On the same date, the learned deputy registrar granted the following orders:

(1) that the writ of summons and statement of claim both dated 25 March 2004, which will expire on 24 September 2004, be extended for a period for six months from 25 September 2004 to 24 March 2005;

(2) that the costs of this application be costs in the cause; and

(3) any other or further relief which this honourable court deems fit and just.

[4] The important point to note here is that the ex parte order was obtained by the plaintiff based on the grounds as set out in the plaintiff's affidavit (encl 4) affirmed by a director of the plaintiff. The significance of this point will appear at a later stage. To appreciate it, I reproduce the grounds as follow:

(a) the plaintiff has been taken over by a new management and the new management has not decided if they wish to continue with this action; and

(b) the new management the plaintiff needs more time to study the facts of this case before they make any final decision.

[5] The writ of summons and the statement of claim were only served on the defendant on 9 March 2005; almost a year after the writ of summons was issued. What follows thereafter was that the defendant took out a summons in chambers (encl 24) dated 29 March 2005 to set aside the order renewing the writ of summons and also to set aside service of the writ. The learned deputy registrar heard it. He refused it: The defendant being dissatisfied with that decision appealed to this court.

[6] Now, as I have shown earlier, the whole thrust of the plaintiff's case for the extension of the validity of the writ of summons was that the plaintiff was under new management and needed more time to decide whether or not to proceed with this action against the defendant. As I perused the various affidavits filed herein, I found that the reason given by the plaintiff was misleading and untrue. The affidavit in support (encl 22) of the defendant's application (encl 24) disclosed that a search with

A the Companies Commission of Malaysia on the plaintiff company showed that there had been no change in the management of the plaintiff as alleged by the plaintiff in its affidavit (encl 4). The defendant further averred that the directors of the plaintiff at that material time were appointed in 1990 and 1998, long before the commencement of this action on 25 March 2004 and there had been no change since
B then. Learned counsel for the defendant had argued, and I agreed with him, that the plaintiff had failed to make a full and frank disclosure of all material facts at the time of filing the ex parte application (encl 5) resulting in the granting of the order by the learned deputy registrar on 10 September 2004. The writ of summons was filed on 25 March 2004. The records showed that the plaintiff had no new directors since 1998. Further on this point, the affidavit filed by the plaintiff (encl 19) to oppose
C defendant's application (encl 24) said that prior to 25 November 2003 the board of directors of the plaintiff comprised of Dato' Tan Eng Boon, En Tan Eng Chia and En Tan Hui Boon. The affidavit further averred that subsequent to 25 November 2003, En Tan Eng Chia who was the plaintiff's executive director resigned as a director but remained a shareholder in the plaintiff and since then the plaintiff had
D not found a suitable candidate as executive director. I would emphasize here that the executive director resigned on 25 November 2003, that is to say, four months before the writ was filed. To my mind the plaintiff's affidavit in fact confirmed that the plaintiff had been under the same management since the filing of the writ of summons. Hence, the reason given that the plaintiff had been taken over by a new
E management and therefore required more time was clearly untrue. What's the effect? Where there is a failure to fully and frankly disclose all material facts or where there is any misleading misrepresentation in an ex parte application it will result in the court setting it aside. This principle was shown in a number of cases. I would draw attention to two decisions. First, the decision of the House of Lords in *Baly v Barrett*
F [1988] NI 368 where Lord Brandon of Oakbrook in his speech said:

> With regard to the first ground of appeal, it is a well established general rule of law that, when a party makes an ex parte application to the court of any kind, he must make a full and frank disclosure of all relevant matters. This general rule applies in particular to an ex parte application for extension of the validity of a writ... My Lords, if I thought that the
G right inference to draw from all the circumstances was that Mr. Coll had deliberately sought to deceive the court by concealing from it what, on any view of the matter, were highly material facts, I would consider that the appeal should be allowed on the ground alone.

[7] And secondly, the decision of our Supreme Court in *Creative Furnishing Sdn*
H *Bhd v Wong Koi @ Wong Khoon Foh t/a Syarikat Sri Jaya* [1989] 2 MLJ 153 where Mohd Azmi SCJ said at p 96:

> Further, in presenting affidavit evidence to establish the necessary ingredients for an ex parte order for a Mareva injunction, it is incumbent on the applicant to make frank and full
I disclosures of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Further to do so at the crucial time of making the ex parte application would invariably be fatal. On this particular point we approve the judgment of VC George J in *KSM Credit & Leasing Sdn Bhd v Data Mante (M) Sdn Bhd & Ors* [1986] 1 CLJ 500 (refd) on the applicability of the principle of frank and full disclosures in all ex parte applications for Mareva injunctions.

[8] That was the principle upon which I acted. In the present case, the plaintiff not only did not fully and frankly disclose material facts concerning the management of the plaintiff company at the material time in obtaining the ex parte order but it also made misleading material representations. The plaintiff said that it had been taken over by a new management when in fact it had not. Applying the foregoing principle to the facts of the present case, I have made a decision that it is fit and proper to set aside the ex parte order.

[9] Now I come to a different point. The general principle is that sufficient or good reason must be shown for the court to exercise its discretion in favour of the renewal of the writ. The validity of a writ can only be extended if there is good reason to do so. That principle was accepted by our Federal Court in *Lloyd Triestino Societa v Chocolate Products (Malaysia) Sdn Bhd* [1978] 2 MLJ 27, where Chang Min Tat FJ speaking for the court said at p 28:

> With respect, we agree, but we would add that the jurisdiction of the court to enlarge the time, even if the application is made within 12 months of the date of issue, is not to be exercised in all cases and indiscriminately. We agree, with respect, with Lord Goddard LJ (as he then was) in Battersby & Ors v Anglo-American Oil Co Ltd & Ors, at pp 32–33 that '... even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made ex parte. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reason appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others, but ordinarily it is not good reason that the plaintiff desires to hold up the proceedings while some other case is tried or to await some future development.'

[10] Turning now to the present case. In the first place, as I have said earlier, the reason given by the plaintiff was untrue. There was therefore no reason whatsoever, good or otherwise and thus no material to warrant the learned deputy registrar exercising its discretion to extend the validity of the writ. In any event, even if the reasons given by the plaintiff that it had been 'taken over by new management' were true, I would say that this was not a good reason to extend the validity of the writ of summons. Here are my reasons. As stated in *Battersby & Ors v Anglo-American Oil Co Ltd & Ors*, which was cited with approval by our Federal Court in *Lloyd Triestino Societa v Chocolate Products (Malaysia) Sdn Bhd*, awaiting some future development is not a good reason to extend the validity of a writ. In *Binning Bros Ltd v Verrall Bowles* [1998] 1 All ER 409, the English Court of Appeal in upholding a decision to set aside the extension of writ held that the fact the plaintiff company was in insolvent liquidation and the liquidator needed time to evaluate the information collated and consider his next step was not a good reason to extend the writ.

[11] In our present case, the plaintiff also had ample time to decide whether or not to proceed with the action, even if the plaintiff had been taken over by new management. The writ was valid for six months. The defendant was a licensed financial institution with branches throughout Malaysia including Johore Bahru.

The writ of summons and the statement of claim could therefore have been easily served on the defendant prior to its expiry on 24 September 2004. To my mind, there was no difficulty in effecting service in order for the plaintiff to preserve its cause of action. The plaintiff had no difficulty instructing solicitors to prepare and file a 27 page statement of claim. In fact, a director of the plaintiff resigned on 25 November 2003, four months before the filing of the writ. This did not however prevent the plaintiff from instructing its solicitors with the relevant facts and documents for them to prepare and file the writ and the 27 page statement of claim. In *Binning Bros Ltd v Verrall Bowles*, the English Court of Appeal in upholding a decision to set aside the extension of a writ took such a matter into account as stated by Hutchinson LJ at p 416:

> ... that I accept Mr Nugee's submission that it is not material to do so because what is quite clear is that by August 1994 the liquidator had received from the defendants sufficient documents to enable his advisors, not only to issue proceedings but to draft and serve a statement of claim...

[12] And further down His Lordship said:

> Since August 1994 the plaintiff had ample time to consider matters. The liquidator was confident enough to instruct solicitors to issue proceedings in December, four months before any limitation problems necessitated that step. What it seems to me, is really being said is, as Mr Nugee submits, that the liquidator desired to have the luxury of more time to consider whether to do that which the rules required him to do within four months. My conclusion is that, on the material before him, the judge was correct to conclude that no good ground had been established for not serving the writ within four months — which in this case, as it would be in most, was an essential ingredient in establishing good reason for an extension.

[13] I agree with the arguments of learned counsel for the defendant that the duty of the plaintiff to serve a writ promptly had been reinforced in recent times in our Rules of the High Court 1980. Order 6 r 7 was amended in 2000 to, among other things, shorten the validity period of a writ from 12 months to the present six months; and to require an applicant for renewal of a writ to show efforts have been made to serve the defendant within one month of the date of the issue of the writ and subsequent efforts thereafter. Again, in *Binning Bros Ltd v Verrall Bowles*, the English Court of Appeal in upholding a decision to set aside the extension of a writ recognised the significance of such a duty on a plaintiff so as not to delay proceedings. There, Hutchision LJ said at p 414:

> It seems to me significant that the period of validity of a writ was, in 1990, reduced from 12 to 4 months, following recommendations in the Civil Justice Review which suggested that then current periods were unnecessarily long for all but special cases.

[14] Learned counsel for the defendant had also drawn to my attention to several authorities, which show that much more meritorious reasons advanced had not been accepted as good reasons to extend the validity of a writ. In *Lloyd Triestino Societa v Chocolate Products (Malaysia) Sdn Bhd*, it was held that the fact that the parties were negotiating was not a good reason. In *New Ching Kee v Lim Ser Hock* [1975] 2 MLJ

183, it was held that the fact that the files were temporarily mislaid when the plaintiffs' solicitors moved premises was not a good reason. In *Baker v Bowketts Cakes Ltd* [1966] 1 WLR 861, it was held that the fact a director of the defendant gave the plaintiffs' solicitors the wrong address for service was not a good reason. All this shows that the jurisdiction of the court to renew a writ of summons is not to be exercised in all cases and indiscriminately. The principle underlying those cases is that renewal of a writ of summons should only be granted where the court is satisfied that good reasons appear to excuse the delay in service. In my judgment, in the present case, the plaintiff had not advanced any good reason for the exercise of the court's discretion to renew the writ of summons.

[15] As a consequence, based on all the aforesaid reasons, I am of the view that in the circumstances of this case the learned deputy registrar had erroneously given no weight to relevant considerations in dismissing the defendant's application in encl 24. In the result, I had allowed the defendant's appeal in encl 42 with costs.

Appeal allowed with costs.

Reported by Eugene Daniel Louis